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No. 06-535

IN THE

Supreme Court of the United States

RODNEY HANS HOLM,

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Utah

BRIEF OF *AMICUS CURIAE* FAMILY RESEARCH COUNCIL IN SUPPORT OF RESPONDENT

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I

INTEREST OF *AMICUS* IN THIS CASE[1]

FAMILY RESEARCH COUNCIL ("FRC") is a non-profit organization located in Washington, D.C. It exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal. FRC contends that contemporary efforts to redefine and undermine marriage, especially through the aggressive advocacy of individual liberty claims in the marriage context, foster a perilous misunderstanding of the role of marriage in America as a social institution uniquely benefitting men and women, their children, and democratic society at large. FRC believes that this Court should deny the Petition for Certiorari, leaving in place the soundly reasoned decision of the Utah Supreme Court upholding the continuing constitutional validity of state bans on polygamy.

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[1]All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *Amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

A central tenet of Petitioner's arguments is that this Court's decision in *Lawrence v. Texas* establishes a broad constitutional right of liberty for intimate relationships which invalidates this Court's decision upholding polygamy prohibitions in *Reynolds v. United States*. The Utah Supreme Court wisely rejected this recipe for social disorder in its decision below, agreeing with the overwhelming majority of courts that *Lawrence*'s narrow holding merely invalidates criminal sanctions for private, consensual sexual conduct between adults. The Utah Supreme Court recognized that marriage is a social institution inherently involving public components, which is regulated in myriad ways by the state for the public good. State polygamy bans are an important part of the legislative scheme governing and protecting marriage and clearly fall outside the scope of *Lawrence*.

REASONS FOR DENYING THE WRIT

Lawrence v. Texas Does Not Support a Constitutional Right to Polygamous Relationships.

A. There is no significant split of authority on *Lawrence*: courts almost universally find it limited to prohibiting criminal punishment for private, consensual sexual conduct between adults.

An overarching theme of Petitioner's argument (and his second question presented for review) is that it is an unconstitutional denial of his personal liberty in intimate relationships for the State of Utah to prosecute him for participating in so-called "religious marriages" in addition to a legal marriage, when he and his wives do not seek legal recognition of these "religious marriages." Petitioner largely grounds this assertion in language from this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). *See* Petition for Writ of Certiorari, 13-18. *See also Utah v. Holm*, 137 P.3d 726, 742 (Utah 2006) ("In arguing that his behavior is constitutionally protected as a fundamental liberty interest, Holm relies primarily on the United States Supreme Court's decision in *Lawrence*").

The Utah Supreme Court, however, wisely and correctly rejected Petitioner Holm's attempt to read *Lawrence* as establishing an expansive doctrine of constitutional sexual liberty:

> Holm argues that the liberty interest discussed in *Lawrence* is sufficiently broad to shield the type of behavior that he engages in from the intruding hand of the state. Holm misconstrues

the breadth of the *Lawrence* opinion.

Holm, 137 P.3d at 742.

Instead, as most courts have found upon considering claims advancing similarly broad applications of *Lawrence*, the Utah Supreme Court noted that, "[d]espite its use of seemingly sweeping language, the holding in *Lawrence* is actually quite narrow." *Holm*, 137 P.3d at 742. As the *Holm* court detailed:

> Specifically, the [*Lawrence*] Court takes pains to limit the opinion's reach to decriminalizing private and intimate acts engaged in by consenting adult gays and lesbians. In fact, the Court went out of its way to exclude from protection conduct that causes "injury to a person or abuse of an institution the law protects." [539 U.S. 558] at 567. Further, after announcing its holding, the Court noted the following: "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct . . . ." Id. at 578.

Holm, 137 P.3d at 742-743.

American courts have overwhelmingly read and applied *Lawrence* in the same careful and measured way as the court below. Though some academics may debate the scope and significance of *Lawrence,* the consistency of its treatment by the courts belies any calls for clarification by this Court, and counsels for this Court's denial of Holm's Petition in this case.

Indeed, the Utah Supreme Court underscored that its construction and application of *Lawrence* is by far the prevailing view of that precedent among American courts:

> [N]umerous litigants have relied upon the *Lawrence* decision to attempt to expand the sphere of behavior protected by the federal constitution. Given the quite limited nature of that case's holding, however, it should come as no surprise that the *Lawrence* opinion has been distinguished more than forty times since it was issued. *See, e.g., Muth v. Frank*, 412 F.3d 808, 817 (7th Cir.2005) ("*Lawrence* . . . did not announce . . . a [constitutionally protected] fundamental right . . . to engage in all manner of consensual sexual conduct, specifically in this case, incest."); *United States v. Bach*, 400 F.3d 622, 628-29 (8th Cir.2005) (holding that *Lawrence* did not protect an adult from criminal sanction for taking pornographic photos of a sixteen-year-old).

Holm, 137 P.3d at 742-743.

A full accounting of the history of *Lawrence* in the lower courts is beyond the scope of this *amicus* brief at this petition stage. Suffice it to say, however, that there are many notable examples of the consistency with which courts have carefully interpreted *Lawrence*, beyond those the Utah Supreme Court cited. *See, e.g., Lofton v. Secretary of Dept. of Children and Family Services*, 358 F.3d 804, 815-816 (11th Cir. 2004) ("*Lawrence*'s holding was that substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct . . . establish[ing] a greater

respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct," but not identifying "a hitherto unarticulated fundamental right to private sexual intimacy"); *Kansas v. Limon*, 122 P.3d 22, 29 (Kan. 2005) (noting *Lofton* and quoting Justice Scalia's dissent in *Lawrence* in concluding that *Lawrence* does not recognize a fundamental right to engage in certain sexual conduct such as would trigger strict scrutiny).

The consistently measured reading given to *Lawrence* by lower courts has also been noted in academic publications. *See, e.g.,* Lynn D. Wardle, *The "End" of Marriage*, 44 Fam. Ct. Rev. 45, 46 (2006) ("several courts–most notably the Eleventh Circuit in [*Lofton*]–explicitly rejected a broad reading of *Lawrence* in defining substantive liberty or privacy"); Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 Mich. L. Rev. 409, 429-430 (2006) (surveying 86 cases discussing *Lawrence* and finding that in less than 10% of them did the application of *Lawrence* ultimately result in a law being found unconstitutional); Joseph J. Wardenski, Comment, *A Minor Exception?: The Impact of Lawrence v. Texas on LGBT Youth*, 95 J. Crim. L. & Criminology 1363, 1395-1396 (2005) ("Despite the *Lawrence* majority's broad themes of equality and dignity for gay men and lesbians, several commentators have argued that the decision's scope is much less expansive. Indeed, in several early decisions applying *Lawrence*, courts have interpreted the decision quite narrowly."); Charles E. Mauney, Jr., Comment, *Landmark Decision or Limited Precedent: Does Lawrence v. Texas Require Recognition of a Fundamental Right to Same-Sex Marriage?*, 35 Cumb. L. Rev. 147, 171 (2005) (reviewing lower courts' application of *Lawrence* and concluding that "both federal and state courts--from a number of jurisdictions and in a variety of contexts--have seized upon

the categories found in *Lawrence*'s limiting language and have held that *Lawrence* does not extend beyond its particular facts").

Given that so much of Holm's Petition is predicated on an expansive reading of *Lawrence* consistently rejected by courts applying that precedent, *Amicus* Family Research Council urges this Court to deny Holm's Petition.

B. Marriage is a venerable social institution inherently involving public conduct, regulated by the state for the public good, and justifiably protected from the ill effects of polygamy.

Having correctly rejected Petitioner's expansive interpretation of *Lawrence*, the Utah Supreme Court outlined the fundamentally different nature of the Petitioner's constitutional challenge to Utah's polygamy ban:

> In marked contrast to the situation presented to the Court in *Lawrence*, this case implicates the public institution of marriage, an institution the law protects, and also involves a minor. In other words, this case presents the exact conduct identified by the Supreme Court in *Lawrence* as outside the scope of its holding.

Holm, 137 P.3d at 743.[2]

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[2]*Amicus* submits this brief to focus additional attention on the issue of "the public institution of marriage, an institution the law protects," leaving the issues concerning a minor's involvement for the State of Utah's response to the Petition.

The Utah Supreme Court's characterization of the difference between Petitioner's claims and the issue in *Lawrence* as a "marked contrast" is profoundly understated. Commencing its thoughtful analysis of the differences, the court explained:

> [T]he behavior at issue in this case is not confined to personal decisions made about sexual activity, but rather raises important questions about the State's ability to regulate marital relationships and prevent the formation and propagation of marital forms that the citizens of the State deem harmful. "Sexual intercourse . . . is the most intimate behavior in which the citizenry engages. [*Lawrence*] spoke to this discreet, personal activity. Marriage, on the other hand, includes both public and private conduct. Within the privacy of the home, marriage means essentially whatever the married individuals wish it to mean. Nonetheless, marriage extends beyond the confines of the home to our society."

Holm, 137 P.3d at 743 (quoting Joseph Bozzuti, Note, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 Catholic Law. 409, 435 (Fall 2004)).

The history of America's grappling with polygamy's challenge to the public institution of marriage, at the threshold of Utah's entrance to the Union, is well-known and is enshrined in this Court's decisions. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879). The Utah Supreme Court found in the resolution of that controversy some important keys

to resisting contemporary efforts to reshape the vital public institution of marriage at the whim of individual liberty claims:

> The very "concept of marriage possesses 'undisputed social value.'" Utah's own constitution enshrines a commitment to prevent polygamous behavior. *See* Utah Const. art. III, § 1; *id.* art. XXIV, § 2. That commitment has undergirded this State's establishment of "a vast and convoluted network of . . . laws . . . based exclusively upon the practice of monogamy as opposed to plural marriage." Our State's commitment to monogamous unions is a recognition that decisions made by individuals as to how to structure even the most personal of relationships are capable of dramatically affecting public life.

Holm, 137 P.3d at 743 (quoting, respectively, *Utah v. Green*, 99 P.3d 820, 827 (Utah 2004) (Durrant, J., concurring), and *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir.1985)).

Taking the lone partial dissenter to task, the Utah Supreme Court rejected the reduction of marriage to nothing more than its private (typically sexual) dimensions. As the court demonstrated, a myopic focus on the privacy aspects of marriage is irreconcilable with the state's longstanding and thoroughgoing regulation of the marriage relationship:

> The dissent states quite categorically that the State of Utah has no interest in the commencement of an intimate personal relationship so long as the participants do not present their relationship as being

> state-sanctioned. On the contrary, the formation of relationships that are marital in nature is of great interest to this State, no matter what the participants in or the observers of that relationship venture to name the union . . . . [T]hat any two people may make private pledges to each other and that these relationships do not receive legal recognition unless a legal adjudication of marriage is sought . . . does not, however, prevent the legislature from having a substantial interest in criminalizing such behavior when there is an existing marriage.
>
> As the dissent recognizes, a marriage license significantly alters the bond between two people because the State becomes a third party to the marital contract. It is precisely that third-party contractual relationship that gives the State a substantial interest in prohibiting unlicensed marriages when there is an existing marriage.

Holm, 137 P.3d at 743-744 (internal citations and footnotes omitted).

In the analogous context of contemporary claims for a constitutional right to same-sex "marriage," several courts have rejected *Lawrence*-based privacy arguments for redefining marriage. These courts have observed, like the Utah Supreme Court, that marriage is a unique institution, so thoroughly interweaving social, legal and public policy implications, that its constitutional dimensions cannot adequately be reduced to privacy concerns. *See, e.g., Hernandez v. Robles*, 855 N.E.2d

1, 10 (N.Y. 2006) (claims for same-sex "marriage" are not *Lawrence*-style claims for "protection against state intrusion on intimate, private activity," given public dimensions of marriage); *Andersen v. King County*, 138 P.3d 963, 987 (Wash. 2006) ("[a]lthough we recognize a right of privacy in personal autonomy, we are not persuaded that it includes the right to marry a person of the same sex").

The state's vital role in protecting the institution of marriage through regulation cannot be gainsaid. Indeed, prompted by the many contemporary attacks on marriage by activists advancing various alternate family structures, growing numbers of notable scholars have called on the political and legal institutions of America to resist efforts to redefine and undermine such an important social institution.

For instance, in June 2006, the Witherspoon Institute issued a joint statement by more than 50 scholars of history, economics, psychiatry, law, sociology and philosophy, calling for a return to the active promotion of an understanding of the unique importance of marriage to civil society:

> Marriage protects children, men and women, and the common good. The health of marriage is particularly important in a free society, which depends upon citizens to govern their private lives and rear their children responsibly, so as to limit the scope, size, and power of the state. The nation's retreat from marriage has been particularly consequential for our society's most vulnerable communities: minorities and the poor pay a disproportionately heavy price when marriage declines in their communities. Marriage also offers men and women as

> spouses a good they can have in no other way: a mutual and complete giving of the self. Thus, marriage understood as the enduring union of husband and wife is both a good in itself and also advances the public interest.

Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 5 (2006) http://www.princetonprinciples.org (available online in its entirety) (hereafter, "*Princeton Principles*").[3]

In the *Princeton Principles*, the signatories review evidences for the importance of a shared understanding of marriage norms from history, the social and biological sciences, and moral and political philosophy. See *Princeton Principles*, 17-33. All of these sources demonstrate the unique and fundamental role played in civil democratic society by a strong, commonly-held understanding of, and public support for, the social institution of marriage. *Id.*

It is on these bases that the *Princeton Principles* scholars underscore the state's crucial part and interest in protecting marriage, including protecting it from the threat of plural marriage:

> Given the clear benefits of marriage, we believe that the state should not remain politically neutral, either in procedure or outcome, between marriage and various alternative family

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[3]The *Princeton Principles*' signatories are listed alphabetically, with position and institutional affiliation, beginning on page 39 of the publication.

> structures. Some have sought to redefine civil marriage as a private contract between two individuals regardless of sex, others as a binding union of any number of individuals, and still others as any kind of contractual arrangement for any length of time that is agreeable to any number of consenting adult parties. But in doing so a state would necessarily undermine the social norm which encourages marriage as historically understood – i.e., the sexually faithful union, intended for life, between one man and one woman, open to the begetting and rearing of children. The public goods uniquely provided by marriage are recognizable by reasonable persons, regardless of religious or secular worldview, and thus provide compelling reasons for reinforcing the existing marriage norm in law and public policy.

Princeton Principles at 14. *See also*, Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 Duke J. Con. Law & Pub. Pol. 1 (2006) (analyzing extensively the ways in which traditional marriage is an important social institution that can only be sustained in a form benefitting society when it is protected by the law); Institute for American Values, *The Future of Family Law: Law and the Marriage Crisis in North America – A Report from the Council on Family Law* (2005) (same).

Criminal prohibitions on polygamy are an indispensable component of state protection for the venerable institution of marriage. As the Utah Supreme Court explained in detail, the same compelling interests which justify the state's licensing,

regulation and promotion of the social institution of marriage justify the state's prohibition of marital forms which undermine such oversight by the state:

> [A] marriage license significantly alters the bond between two people because the State becomes a third party to the marital contract. It is precisely that third-party contractual relationship that gives the State a substantial interest in prohibiting unlicensed marriages when there is an existing marriage. Without this contractual relationship, the State would be unable to enforce important marital rights and obligations. In situations where there is no existing marriage, the Legislature has developed a mechanism for legally determining that a marriage did in fact exist, even where the couple did not seek legal recognition of that marriage, so that the State may enforce marital obligations such as spousal support or prevent welfare abuse. There is no such mechanism for protecting the State's interest in situations where there is an existing marriage because, under any interpretation of the bigamy statute, a party cannot seek a legal adjudication of a second marriage. Thus, the State has a substantial interest in criminalizing such an unlicensed second marriage.
>
> Moreover, marital relationships serve as the building blocks of our society. The State must be able to assert some level of control over those relationships to ensure the smooth operation of laws and further the proliferation

> of social unions our society deems beneficial while discouraging those deemed harmful. The people of this State have declared monogamy a beneficial marital form and have also declared polygamous relationships harmful. As the Tenth Circuit stated in *Potter* [*supra*, 760 F.2d at 1070], Utah "is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship."

Holm, 137 P.3d at 744 (internal citations and footnotes omitted).

In addition to preserving the state's ability to effectively regulate legal marriage, many other strong policy justifications for prohibiting polygamy have been recognized. *See, e.g.*, Joseph Bozzuti, Note, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 Catholic Law. 409, 434-441 (Fall 2004) (examining several "non-moralistic bases upon which anti-polygamy statutes can be grounded," including protecting minors from being forced into polygamous marriages, protecting children born of polygamous marriages, protecting women from the physical, emotional and financial effects of polygamy, and preventing polygamists' abuse of tax laws).

In the end, the Utah Supreme Court's decision was exactly right. Polygamous relationships, even those for which legal recognition is not sought, have always been recognized in the United States as a marital form harmful to the public institution of marriage and contrary to the common good. The state has a compelling interest in protecting marriage and in protecting its citizens. The State of Utah's criminal

prosecution of polygamy, upheld by the Utah Supreme Court, is consistent with both *Reynolds* and *Lawrence*, and presents nothing for review by this Court.

CONCLUSION

Amicus respectfully requests that this Court deny Rodney Hans Holm's Petition for a Writ of Certiorari.

Respectfully submitted,

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